

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:CTM:LN:TL-N-1085-01

JMMarr

date:

to: [REDACTED], Team Leader, Examination Division, LMSB, [REDACTED]  
[REDACTED], Team Coordinator, Laguna Niguel POD, LMSB,  
[REDACTED]

from: Joyce M. Marr, Attorney (LMSB)  
June Y. Bass, Associate Area Counsel (LMSB)

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subject: [REDACTED] (Form 872 for Tax Year Ended  
[REDACTED])  
Statute of Limitations Date: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in response to your request for advice dated February 14, 20001, as to the proper caption to use on a Consent to Extend the Time to Assess Tax (Form 872) to extend the statute of limitations for the short period beginning on [REDACTED] and ending on [REDACTED].

Issue

How should a Form 872 to be secured to extend the time to assess income tax against the [REDACTED]

consolidated group for the short period ended  
, be captioned?

### Conclusion

The proper language to use on the Form 872 for the consolidated group's taxable year ended is " (E.I.N. ), as alternative agent for the consolidated return group pursuant to Temp. Treas. Reg. §1.1502-77T, and as successor by merger of (E.I.N. )." Put an asterisk immediately thereafter. At the bottom of the page, the following language should be added (including the asterisk):

\* This is with respect to the consolidated tax liability of the (E.I.N. ) consolidated return group for the taxable year ended .

The Form 872 should be signed by a current officer of Under the officer's name, you should type in his or her title and the name "

As we have indicated in our previous advisory opinion on this subject dated October 5, 2000, since the requirements of I.R.C. § 6501(c)(4)(B) pertaining to giving the taxpayer notification of certain rights must be satisfied, please ensure that the statute extension is requested by the most recent revision of Form Letter 907 or 967.

### Facts

(EIN ) filed a consolidated income tax return for the short period beginning on , and ending on . On this short-period return, stated that it was incorporated on . Thus, this was the initial return filed by .

was an indirect subsidiary of

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<sup>1</sup> The E.I.N. which we have set forth is the E.I.N. shown on 's Form 8-K dated , which we downloaded from LEXIS (See Exhibit B affixed hereto). When preparing the Form 872, please verify that this is the E.I.N. for according to the Service's records.

██████████, a German corporation which is the ultimate parent of a large multinational group of companies. On ██████████, as part of an internal reorganization of the ██████████ group corporate structure, all of the shares of ██████████ were transferred to ██████████, a Delaware corporation.

On the Affiliations Schedule for ██████████'s consolidated income tax return, ██████████ included ██████████ (EIN ██████████). Affixed hereto as Exhibit A is an organizational chart showing that as of ██████████'s parent corporation was ██████████, a Delaware corporation, a first tier subsidiary of ██████████.

On ██████████, a consortium consisting of ██████████, an affiliate of ██████████, and another distributor of electronics entered into a share purchase agreement to purchase the ██████████ for \$██████████ in cash. See ██████████'s Form 8-K dated ██████████, which is affixed hereto as Exhibit B.

Effective ██████████, pursuant to Section 905 of the Business Corporation Law of the State of New York, ██████████ and two other corporations<sup>2</sup> were merged with and into ██████████, with ██████████ "assuming all of the liabilities and obligations." Affixed hereto as Exhibit C are copies of the relevant "Certificate of Ownership and Merger" and "Certificate of Merger."

#### Discussion

In general, the common parent corporation and each subsidiary which was a member of a consolidated group during any part of the consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

Generally, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each

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<sup>2</sup>The two other corporations were ██████████ and ██████████.

subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id.

An agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year is applicable to each corporation which was a member of the group during any part of such taxable year, and to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of § 1.1502-75. Treas. Reg. § 1.1502-77(c).

Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

If for any reason the common parent corporation's existence is about to terminate, the regulations require that it notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. Treas. Reg. § 1.1502-77(d).

If the notice thus required is not given by the common parent, or the designation is not approved, the remaining members may, subject to approval by the appropriate Service official, designate another member to act as such agent, and notice of such designation shall be given to such district director. Id. Until a notice in writing designating a new agent has been approved, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability. Id.

Temp. Treas. Reg. § 1.1502-77T, promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). In general, where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Treas. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the consolidated return group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of

limitations.

Under Temp. Treas. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which § 381(a) applies,
- (iii) The agent designated by the group under § 1.1502-77(d), or
- (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

With regards to Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii) above, I.R.C. § 381 provides, in relevant part, that in a transfer of assets to which I.R.C. § 361 applies, and which is in connection with a reorganization described in I.R.C. § 368(a)(1)(A), the acquiring corporation succeeds to and takes into account the items of the transferor corporation described in I.R.C. § 381(c).

Section 361(a) provides that no gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Section 368 defines what constitutes a reorganization within the meaning of section 361. Section 368(a)(1)(A) provides that the term "reorganization" means "a statutory merger or consolidation".

In the case at hand, the facts suggest a valid I.R.C. § 368(a)(1)(A) statutory merger under New York law, in which the assets and obligations of [REDACTED] were transferred to or merged into [REDACTED], and the outstanding stock certificates of [REDACTED] became shares in the surviving corporation, i.e., [REDACTED]. Section 361 would apply to this merger, and consequently, I.R.C. § 381 would also apply to the transaction. Therefore, [REDACTED] was a successor to the former common parent, [REDACTED], in a transaction to which I.R.C. § 381(a) applies, and [REDACTED].

should qualify to act as an alternative agent for the [REDACTED] consolidated return group pursuant to Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii).

Section 906(b)(3) of the Business Corporation Law of the State of New York provides, in pertinent, that when a merger is effected, "[t]he surviving ... corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." In addition, the "Certificate of Ownership and Merger," affixed hereto as part of Exhibit C, indicates that [REDACTED] assumed all of the liabilities and obligations of the constituent corporations in the present merger. Thus, under New York law and the pertinent merger documents, [REDACTED] succeeded to the consolidated tax liability of [REDACTED], and is liable for this liability. Thus, in addition to being an alternative agent for the [REDACTED] group, [REDACTED] is a successor to [REDACTED]'s tax liability. This is an additional reason for obtaining the Form 872 from [REDACTED].

This advice has been coordinated with the Office of Chief Counsel. With the rendition of this advice, we are closing our file. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

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JOYCE M. MARR  
Attorney (LMSB)

Attachments: As stated